United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1510

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1510

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

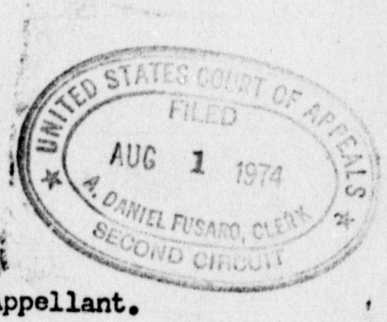
MIDLAND EQUITY CORPORATION,

Defendant,

and

JAMES JOSEPH HAMMARTH,

Defendant-Appellant.



Appeal from the United States District Court
for the Southern District of New York

REPLY TO THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION.

JAMES J. HAMMARTH
21 Davenport Avenue
New Rochelle, New York 10805

Appellant.

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REPLY TO THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION.

REPLY TO THE COUNTERSTATEMENT OF ISSUES PRESENTED

1. Paragraph 1, page 1. Commencing line 3. ....."and is required by 17 (a) of that act, 15 USC 78q(a), to permit the Commission to inspect the books and records."

Reply: Note: that this is the only violation alleged by the Commission to be at issue.

2. Paragraph 2, line 7, ..." but claims he has resigned these positions".....

Reply: The burden of proof is upon the Commission to refute these claims. They have neither solicited or elicited any testimony in this area.

3. Paragraph 2, line 8, ..." sold all the outstanding stock of the corporation, which had been owned by his wife, before the Commission brought an action to enjoin the broker dealers refusal to permit inspection"....

Reply: The burden of proof is upon the Commission to refute this claim. They have neither solicited or elicited testimony in the matter.

REPLY TO THE COUNSTERSTATEMENT OF THE CASE

4. Paragraph 1, page 3, commencing line 6. ".....shown in the Commissions records to be the sole officer and sole director of Midland"....

Reply: It must be pointed out that the Commission's records were seriously out of date at the time of the commencement of this action. After their visit on 23 October 1972, the only contact with Midland that they claim to have initiated (See Record of Trial Document 10) was a letter dated 31 January 1973.

5. Paragraph 1, page 5, commencing line 3 "...the statute provides that it may voluntarily withdraw its registration".....

This is the crux of the matter. Is cessation of business under SIPC law Section 10 (a) 15 USC 78 jjj voluntary? Was it intended to be voluntary.

5a. Page 5, paragraph 1, line 8. "....Generally, a notice of withdrawl, which must be filed on a prescribed form, will become effective in sixty days or such shorter period as the Commission may permit".

Reply: A careful reading of Rule 15 (b) 6-1, 17 CFR 240.15b 6-1 provides that notice of withdrawl shall be filed on a prescribed form. It does not say must. In any case not giving notice on the prescribed form does not invalidate that fact of the notice. The notice is either valid or in violation of Rule 15(b)6-1 of 17 CFR 240.15b 6-1. However, in any case it is still notice, (Notice is actual when it is directly and personally given to the notified. 58 Am JUR 2nd Par 8). as evidenced in the Appoldt and Green visit (Supp App 9a,10a,11a). If it is a violation, any citation in this case should be for failure to give notice as required by Rule 15b 6-1 (17 CFR 240.15b 6-1) in a proper manner.

5b. Page 5, paragraph 1, line 11. "Section 15 (b)(6) further provides for the entry of an order by the Commission cancelling the registration of any firm that the Commission finds has "ceased to do business as a broker-dealer".

Reply: A careful reading of Section 15 (b)(6) (17 CFR 240.15b 6-1) fails to bring to light any such provision. It concerns itself only with voluntary withdrawl and the conditions under which this may take place. Specifically, the section provides, "except as hereinafter provided, a notice to withdraw from registration filed by a broker or dealer pursuant to Section 15 (b) shall become effective on the 60th day after filing

with the Commission.....", except..... that if it is filed at any time subsequent to the date of issuance or prior to its effective date the Commission institutes proceedings, the notice of withdrawl shall not become effective."

However, since notice had been given (Appoldt and Green visit, Supp App 9a,10a,11a) and no proceedings had been instituted by the Commission for 60 days (See Rec. of.Trial, Doc. 10 - these proceedings were instituted on 13 June 1973) the notice to withdraw must have become effective on the 60th day after filing with the Commission as provided in 15b 6-1(b) (17 CFR 240.15b 6-1).

5. C The Commission has made much of 15 USC 78o (b)(6). (See pages 5, 9, 12, 13, 14 of Commissions Brief). We quote it in part, "If the commission finds that any broker dealer or any broker dealer for whom a registration is pending, is no longer in existance or has ceased to do business as a braker dealer, the commission shall by order cancel the registration or application of such broker dealer."

This section refers clearly to a housekeeping duty of the Commission and contains no verbiage that would indicate that the Commission was authorized to maintain the fiction of an operating firm for purposes of prosecution. Further it does not mandate a finding by the Commission in order to establish the de facto cessation of business. It merely permits the Commission to make such a finding "If the Commission finds ....."

Reply: (1) That there is no provision of Sect. 10 (a) 15 USC jjj (a) or any other portion of the act providing for the filing of written notice to the Commission.

Reply: (2) That the filing of an order by the Commission cancelling the registration of any firm that the Commission finds "has ceased to do business as a broker dealer" refers only to a duty of the Commission and does not exclude the condition of that registration having been voided in some other way, such as the death of a member. See Rule 15b 6-1, 17 CFR 240.15b6-1.

6. Page 6, line 5 "....No document has ever been filed with the Commission indicating that any other person than Mr. Hammarth has ever been an officer or director of Midland since it registered with the Commission, or that any person other than his wife has ever owned stock in that corporation, although the Commission's rules require that a broker dealer must report changes in the status of its officers and directors and changes in stock ownership"....

Reply: Any changes as regards officers or directors of the Corporation, as well as any changes in stock ownership would have to have been reported subsequent to Mr. Hammarth's resignation 15 February 1973 and the responsibility for reporting such changes would have fallen to his successor.

REPLY TO THE STATEMENT OF THE FACTS

7. Page 7, line 1."....While Mr. Hammarth was admittedly still in control of Midland, on October 23, 1972 the Commission's New York Regional office received a letter from the National Association of Securities

Dealers ("NASD") informing the Commission that Midland had failed to inform the NASD that Midland was having financial difficulties.

Reply: (1) The Commission has submitted no evidence of the existence of such a letter.

Reply: (2) By that date, 23 October 1972 Midland was no longer a member of the National Association of Securities Dealers as its membership along with its SEC registration had been terminated by SIPC Law Section 10(a) 15 USC 78jjj(a), according to a letter received by it by certified mail dated 3 October 1972, postmarked 6 October 1972, and assumed to be effective on or about 11 October 1972. (See App, page 9).

8. Page 8, line 6. "....Inquiry of the NASD indicated that it had information that Midland was in violation of the Commission's net capital rule, supra p.4 (Supp. App. 13a).

Reply: There was no evidence of violation introduced by the Commission, rather Mr. Gregg states (App page 35), "that they (NASD) would not produce various information that they had gleaned without a subpoena".

9. Page 8, line 9. "...The Commission's request to examine Midland's books and records was thereafter renewed by telephone calles to Mr. Hammarth."....

Reply: The time, date or success and who or what was reached, or if in fact the calls were made, has never been established. (App 34-35).

10. Page 8, line 11. "... and by a letter (Supp. App 16a)."

Reply: The letter contains no suggested course of action. It contains no time, date or place for compliance, not does it suggest the manner of compliance.

Reply:(2) This letter is not on Securities and Exchange Commission stationary and it contains no address suggesting where or how it may have originated.

Reply: (3) It makes no suggestion as to what authority the writer might have had for issuing it, no, who they were or in what official capacity they might be acting.

Reply: (4) The Commission has introduced no evidence to establish when this letter may have been mailed or when it was received. See Record of Trial A-10-43.

11. Page 9, paragraph 2, line 1. "Judge Gagliardi on December 7, 1973, filed a memorandum decision (A 3-7) in which he found "both of these contentions equally untenable"(A-5).

Reply: On closer inspection we find that Judge Gagliardi had a faulty perception of what was really happening at this point because he writes, "...Second: Hammarth contends that as a result of a sale of his Midland shares to one Joseph P. Goggins, he is not individually subject to the inspection provision. We find both of these contentions untenable". Judge Gagliardi's use of the pronoun "his" and "he" Supra indicates that he was unaware at the time he wrote the opinion (A 3-4) that Mr. Hammarth in fact owned no shares. The shares owned were his wife's. His participation in the sale was as agent, and that he was attempting to communicate the fact of his resignation.

12. Page 9, paragraph 2, line 3. "...He found that Midland had never filed a notice of withdrawl of its registration in accordance with Section 15b(6)"...

Reply: Apparently both the SEC and Judge Gagliardi are confused in this area. App.page 5, paragraph 1. "In order to terminate registration a broker dealer is required to file a formal notice of withdrawl with the Commission, the form of such notice and the manner in which it must be filed are described in Rule 15b 6-1 (k7 CFR 240.15b 6-1). Admittedly, Hammarth has never filed the required withdrawl form with the Commission."

Errors: (1) Hammarth has never been a registered broker-dealer and therefore had no obligation to file when he left his employment with Midland. The Judge here confuses Hammarth with the entity Midland. The SEC is aware that their relationship and jurisdiction over Hammarth terminates with the termination of Hammarth's employment. The Judge is obviously confused but the attorney for the Commission has taken care to make the distinction, changing Hammarth to Midland in paraphrasing the Judge's decision. They start with a quotation mark "both of these contentions" etc. and then switch to a paraphrase being careful to correct the Judge's sentence and also to leave out the quotation mark that would make their treatment an out and out falsification of the quotation.

(2). Further evidence of the Judge's confusion is apparent in this passage from the Record of Trial (A-16).

> "The Court: Under the law you are still there until relieved according to the SEC.
>
> Mr. Hammarth: Sir, if I may he has not documented that. That is an undocumented position.
>
> The Court: It is not undocumented. It is right here. (It is not clear what the Judge could be referring to).

Mr. Hammarth: No, Sir. I am not registered. I was never registered as a broker dealer. The Corporation was registered as a broker dealer. I was an employee of the Corporation and in fact was not a stockholder."

(a) The SEC has never produced evidence that it is necessary to file a broker dealer withdrawl form (FORM BDW) or give notice before resigning, by an employee or director of a registered Corporation.

(b) Efforts to continue my employment constructively for purposes of SEC accountability are a violation of my 13th Amendment rights (Prohibition against involuntary servitude. Barring factual evidence of that employment.

(c) Although the SEC and the Court have tried to build a case around the invalidity of the sale of Midland, neither has contested the cessation of Mr. Hammarth's employment.

(d) Having resigned as a corporate employee as of 15 February 1973, the duty for reporting his resignation to the Commission would fall to Mr. Hammarth's successor.

(3) The basis for the Commission's jurisdiction over Midland is its registration statement, however the basis for the Commission's jurisdiction over Mr. Hammarth was his employment. The Commission has presented no evidence to the contrary. See 17 CFR 240.15b1-1 through 15b1-7. Mr. Hammarth's employment and the Commission's jurisdiction ceased on February 15, 1973 and this action was not brought until 13 June 1973.

13. Page 9, paragraph 3, line 1. ..."Hammarth indicated hat he was not willing to assist the Commission in locating Goggins and through

him the books and records of Midland. Hammarth's attitude in response to questions concerning the purported sale can only be described as evasive and casts substantial doubt upon the bona fides of the sale. At the time of the sale Hammarth had violated and was continuing to violate the provisions of Section 17 (a)....."

Reply: Judge Gagliardi has completely misapprehended and misconstrued what happened as demonstrated in this paragraph.

(a) He has based a finding that the bona fides of the sale are in doubt because of Mr. Hammarth's unwillingness to do the investigating work of the Commission. This requirement for self-incrimination is a violation of the defendant's Fifth Amendment rights against self incrimination.

(b) The bona fides of the sale have no bearing on the case whatever. Since Mr. Hammarth's only relationship to the Corporation was as an employee the only significant fact here is Mr. Hammarth's resignation from employment with Midland Equity Corp.

The question is: did Mr. Hammarth resign? And the answer is that he did. The SEC has presented no evidence to the contrary nor indeed did they solicit it. Nor did Judge Gagliardi.

(c) Since Mr. Hammarth resigned, he had no responsibility to file a formal notice of withdrawl under 15b 6-1 (17 CFR 240.15b-6-1) as the manner of the continued operation and administration of the Corporation was no longer his concern.

(d) Judge Gagliardi has never challenged the fact of Mr. Hammarth's resignation which is incidental to the fact of the sale of the Corporation upon which the Judge places great weight.

14. Reply to Footnote 9, page 9. "Nor has any order ever been entered by the Commission cancelling Midland's registration under Section 15 (b) 6"....

A careful reading of Section 15 (b) 6-1 does not indicate that any necessity for the Commission to enter an order cancelling Midland's registration or any other registration. Rather 15b-6-1 states explicitly that "Except has hereinafter provided, a notice to withdraw from registration filed by a broker or dealer pursuant to Section 15(b) shall become effective on the 60th day after the filing thereof with the Commission.

Further, Rule 15(b) 6-1, Withdrawl from Registration states (Section a) notice of withdrawl from registration as a broker-dealer shall be filed on Form BDW in accordance with the instructions contained therein.

"...shall be filed on Form BDW in accordance with instructions contained therein...." does not mean that it must be filed on Form BDW and oral notice of the cessation of registration as given compliance examiners Appoldt and Green during their visit 25 October 1972 (Supp App. pages 9a,10a,11a) is sufficient to fulfill the obligations of the 15b 6-1.

Given that the SEC has introduced no evidence to indicate that Midland was operating beyond 25 October 1972 (See Record of Trial App Doc 10) and that.... a notice to withdraw filed by a broker or dealer pursuant to Section 15 (b) shall become effective on the 60th day after filing thereof with the Commission or within such shorter period of time as the Commission may determine.

Since there were no proceedings filed by the Commission for 60 days after notice was given to the complaince examiners, and no allegation of violation of Section 15(b) 6-1(a) was brought for failure to file notice on Form BDW, we must assume that in accordance with the law, Midland's voluntary cessation of business as recorded by Appoldt and Greene was sufficient notice under Rule 15 (b) 6-1 and that Midland's registration was terminated in accordance with that rule. (Notice is actual when it is directly and personally given to the notified - 58 Am JUR 2nd par 8).

As regards notice by Midland, Mr. Appoldt in his affadavit confirms that, ".... Whereupon, I requested that Hammarth provide the staff with a letter to that effect which he undertook to do"....

15. He found that Midland had never filed a notice of withdrawl of its registration in accordance with Section 15 (b)6 and rule 15(b) 6-1 thereunder. (A 3)

Reply: Judge Gagliardi in this instance misconstrued the word shall for the word must or its equivalent. The sufficiency of notice given to Appoldt and Green during their visit (Supp App 9a,10a,11a) was not taken into consideration in evaluating this situation and the fact of a failure of the SEC to act for the requisite 60 days as provided in 15 (b)6-1 (17 CFR 240. 15b-6-1) was ignored. Further, the effective date of notice under this rule, 15(b) 6-1 the 60th day after its being given was further ignored by the Court.

REPLY TO ARGUMENT

16. Page 10, paragraph 1. " It is well established that entry of an injunction pursuant to Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e), is appropriate where there is a reasonable likelihood of future violations, and that this likelihood may be inferred from past violations.

Reply: There is but a single allegation of violation and that is "refusal to permit inspection under Rule 17 (a) 15 USC 78 (q)a. Whether or not that was a violation is the issue before the court.

17. Page 11, paragraph 1. "If as we contend, Midland was a broker dealer when Mr. Hammarth refused to permit examiners to inspect its books and records it does not seem open to serious dispute that Midland violated Section 17(a) of the Securities Exchange Act and Rule 17a-4 thereunder..."

Reply:(1) Midland's registration was terminated by the operation of Section 10(a) 15 USC 78jjj(a) on 11 October 1972.

(2) Midland's registration was terminated 25 Dec 1972 through the operation of Rule 15b 6-1 (17 CFR 240.15b-6-1) after Midland had given notice to the compliance examiners Appoldt and Green on the occasion of their visit 25 October 1972.

(3) The SEC had no jurisdiction over Midland or Hammarth at the time of commencement of action 13 June 1973.

(4) The Commission had lost its jurisdiction over the defendant Hammarth by virtue of his resignation 15 February 1973.

(5) There have been no allegations of violation of Rule 17a-4 either in the complaint, at the time of trial, or in the opinion rendered by the Court. See References: Complaint - Doc. 1, Record of Trial, Doc. 10, and Memorandum Decision App pages 3-7.

18. Footnote 12, page 11. "...Assuming these arguments had merit, the propriety of the injunction as applied to Midland is not before this Court. Mr. Hammarth has appealed solely in his individual capacity and Midland has taken no appeal".

Reply: Midland has taken no appeal because:

(a) The Commission has not presented any evidence that Midland was notified of this proceeding.

(b) Midland was not represented at the proceeding.

(c) In being enjoined while deprived of the supportive testimony of the corporate defendant in matters pertaining to the sale of the corporation and Mr. Hammarth's resignation, Mr. Hammarth is being deprived of his 14th Amendment right to a fair trial.

(d) Since Midland was the alleged perpetrator and Hammarth the aider and abbetor (Reply Br. p. 11), if judgement was fraudulently entered against Midland in violation of its constitutional rights and the judgement against Midland falls, the entire injunction becomes invalid because:

1. Midland has control of the books and is under no obligation to the Commission.

2. There can be no accusation of aiding and abetting without the presence of a violation and a violator.

3. An injunction invalid in part is completely invalid.

19. Footnote 13, page 11. The cases which the SEC cites in support of their contention that an officer or director of a broker-dealer firm may be enjoined based upon his role in aiding and abetting the firms violation are all cases in which the officer or director was employed by the firms in question at the time of being cited by the Commission for some violation.

Mr. Hammarth was not employed by Midland Equity at the time of the commencement of the action, 13 June 1973. See Complaint, Doc. 1.

20. Page 12, line 1. "....and that Midland's registration has never been withdrawn or cancelled....."

Reply(1)Midland's registration was cancelled by the operation of the SIPC Act Sec. 10(a) 15 USC 78jjj.

(2) Midland's registration was invalidated by the operation of Section 15b (6) (17 CFR 240.15b-6) which provides generally that a broker having given notice to the Commission of withdrawl from registration (as in the Green and Appoldt visit Supp App 1a,11a), barring the existence of, or institution of proceedings by the Commission, that notice to withdraw shall become effective on the 60th day after filing with the Commission.

This action was not instituted until 13 June 1973, and there were no other proceedings. If the form of the notice was irregular it may have been a violation of Rule 15b 6-1 but no one cited it as such. Irregularity of form in no way invalidates the requirement of notice.

21. Page 12, paragraph 2, line 3. "....Mr. Hammarth contends that Midland is no longer registered as a broker and dealer in

securities. As the district court found (A 5) "This argument is clearly without merit"..... "Registration and engaging in business" are discrete concepts". A company that is registered is merely permitted to conduct business as a broker dealer if it is otherwise lawful for it to do so. Midland was informed of this distinction in the letter sent to Midland by the Commission on 26 June 1969 (Supp App 5a) which advised Midland that its registration had become effective."

Reply: The obverse of the above statement would be that " A company that is not registered is merely not permitted to engage in business if it is otherwise lawful for it to do so".

The Commission has made a distinction without a difference, and they then proceed to buttress their argument by referring to a letter mailed in 1969, (Reply Br. page 12) which differentiated between registration with the Federal Government and the compliance necessary to transact business in these jurisdictions. We are not concerned here with this distinction between the varying regulatory authorities and their varying registration requirements. We are concerned only with the regulations of the Federal Government and indeed operation of the very same Act, the Securities Act of 1934 of which the SIPC regulations (Section 78 jjj) are now to be considered a part. (Section 78 bbb) (15 USC 78 bbb), Chapter 2B-1 of the Exchange Act.

The only course of action open to anyone seeking to comply with Federal Regulation is to obey that rule first whose operation comes first into play and this is what Midland and Hammarth have done.

22. Page 13, paragraph 1, line 1. "If Mr. Hammarth's theory were adopted, a broker dealer could unilaterally relieve itself of the responsibilities imposed by the Securities Exchange Act merely by refusing to pay the assessment under the Securities Investor Protection Act."

Reply: (1) Yes, at the penalty of going out of business which is drastic.

(2) The NASD and SEC along with the Exchanges are charged with collecting dues, and charged with the responsibility for compliance under the 1934 Act and we can only conclude that Congress considers this no great burden.

(3) All of the usual tools for enforcement are available to the Commission should there be allegations of foul play.

(4) The Commission's ultimate weapon in an enforcement proceeding is an injunction prohibiting the forbidden act, which is much less drastic than the penalty of going out of business.

23. Page 13, paragraph 1, line 4. "....This would permit it (a broker dealer) to evade the statutory procedures for voluntary withdrawl under Section 15b (6) of the Securities Exchange Act, pursuant to which the Commission has the right to impose terms and conditions on voluntary withdrawl. "

Reply: The key operative word here in both instances is voluntary. The SIPC rules were ex post facto laws, prohibited by Art. 1, Sect. 8 of the U.S. Constitution. Every dealer then operating should have had protection from their operation in the form of a grandfather clause, if their operations antedated the law.

Instead they were imposed on the financial community in the form of dues to a "private" institution, the penalty for non-payment of which was removal from the financial community. However, the imposition of those laws was in no way "voluntary" and as a condition of doing business, they are exceedingly dangerous to the smaller broker dealer as well as to the large. They are dangerous in that they raise to the level of violation ordinary commercial error.

Prior to the imposition of SIPC, a net capital violation would give rise to normal commercial penalties while bankruptcy would bring on ligquidation. Under the SIPC rules violation of the net capital requirements of the SEC subjects one to involuntary liquidation at the hands of a SIPC trustee.

Since almost everyone knows that liquidating trustees are not normally beneficial to the maintenance of ones capital accounts, the imposition of the SIPC rules becomes an impossible condition of doing business when one considers that under a SIPC liquidation one might be eminently solvent, but in violation of the Commission for some technical reason and be forced into liquidation.

We see then, that leaving the securities business since the advent of SIPC becomes a prudent measure for the smaller operator.

Protecting the assets of a firm entrusted to you is an obligation of the corporate officer and director. Withdrawing from SIPC is no more voluntary than giving your wallet to an armed robber.

24. Page 13, paragraph 2, line 1. "Moreover, the last sentence of Section 15 (b) (6) of the Securities Exchange Act expressly provides for cancellation of the registration of any broker or dealer that the Commission finds "has ceased to do business as a broker or dealer". Under that provision the registration of a broker-dealer continues until the Commission has made the appropriate finding and issued an order of cancellation".

Reply: A careful reading of Section 15 (b)6-1 Withdrawl from Registration brings to light no such terminology.

Note: Rule 15 (b) 6-1 was formerly Rule 15 (b)(6), renumbered, Release 34-7700 dated 10 Sept. effective 24 Sept. 1965. Amended Apr. 1, effective 2 May 1966, Release 34-7847.

To the contrary, Rule 15 (b) 6-1 states: Except as hereinafter provided, a notice to withdraw from registration filed by a broker or dealer pursuant to section 15 (b) shall become effective on the 60th day after the filing thereof with the Commission".....

Notice given to the Commission during the Appoldt and Green visit, 25 October 1972 (Supp App 9a,10a) was in compliance with Section 15 (b) 6-1(b). "Notice is actual when it is directly and personally given to the notified" 58 Am Jur 2nd Par 8.

In any case, the registration of Midland was withdrawn under this section 26 December 1972, because the Commission had not issued an order instituting proceedings prior to 25 October 1972, nor had they instituted proceedings before 26 December 1972, pursuant to Rule 15 (b) 6-1 (17 CFR 240.15 (b) 6-1).

25. Page 13, paragraph 2, line 6. "....The very provision of the Securities Investor Protection Act upon which Mr. Hammarth relies - Section 10 (a) - support this conclusion. Under its terms, a registered broker-dealer may be "specifically authorized by the Commission" to continue to transact business even after it has failed to pay an assessment.

Reply: The operative language in this section 15 USC /78JJJ "It shall be unlawful, unless specifically authorized by the Commission, to engage in business as a broker dealer." Here we are back to the imaginary distinction between engaging in business and being a registered broker dealer. The distinction is inoperative unless we postulate the registration of social broker dealerships. I have searched in vain for a section (SEC Act 1934) covering registered broker dealers who are not authorized to do business.

Further, there is no evidence of Midland Equity being specifically authorized to engage in business pursuant to 15 USC /78 JJJ.

(b) Page 13, paragraph 2, line 11. "The plain implication of this provision is that a firm has failed to pay its assessment continues to be subject to Commission oversight."

Reply: Every citizen and every firm operating in the United States is subject to Commission oversight. The Commission has been charged with enforcement of the Securities Laws and we are all subject equally to its oversight in our varying capacities and capabilities for mischief. We are concerned here with the violation of a regulation not with an "implication" of some related offense.

(c) Page 13, paragraph 2, line 13. "....If Midland might lawfully deny access to its books and records because it did not pay the assessment, the Commission would be unable to determine whether Midland has ceased business as a broker-dealer, even though such a determination is necessary for it to decide whether cancellation of Midland's registration pursuant to Section 15 (b) (6) of the Securities Exchange Act is required (if the business has ceased) or to decide whether an enforcement action for violation of Section 19 (a) of the Securities Investor Protection Act against Midland would be appropriate (if it should appear that Midland's business as a broker or dealer has not been ended".

Reply: The Commission would be unable to determine whether Midland has ceased business as a broker dealer.

The burden of proof in alleging activities as a broker dealer in contravention of the registration provisions is always on the Commission and since any person or firm is subject to this type of allegation, we are all equally protected by a lack of evidence and the Commission has at its disposal all the tools that would normally be available to it in determining securities operations in violation of the registration provisions of the act. (SEC Act of 1934).

(d) Page 14, paragraph 1, line 1. "....even though such a determination is necessary for it to decide whether cancellation of Midland's registration pursuant to Section 15 (b)(6) of the Securities Exchange Act is required (if the business has ceased) or to decide whether an enforcement action for violation of Section 10 (a) of the Securities

Investor Protection Act against Midland would be appropriate (if it should appear that Midland's business as a broker or dealer has not been ended."

Reply: (1) There is no provision for the necessity of such a determination in the 1934 Act or Rule 15 (b) 6-1.

(2) If Midland's registration is terminated pursuant to 15 CFR 78 jjj (SIPC), it is terminated for cause.

(3) If Midland's registration was terminated pursuant to 17 CFR 240.15 (b) 6-1 it was terminated in a regular fashion.

(4) There were no allegations of improper activity alleged by the Commission that would require an investigation of Midland's books to determine whether its brokerage business had been terminated.

(5) There is no requirement for access to a firms books in order to find that business has ceased. In fact we can find no reference to this section in 17 CFR 240.15 (b)6-1.

26. Page 15, point 2. "Entry of the Preliminary Injunction against Mr. Hammarth was a Valid Exercise of Discretion. The order entered by the District Cout (Supp App 1a-2a) preliminarily enjoins Mr. Hammarth from violations of Section 17 (a) and Rule 17a-4 with respect to Midland or any other registered broker dealer of which Mr. Hammarth may become a principal or controlling person.

Reply (1) There have been no allegations of violation of Rule 17a-4 as demonstrated supra. (See Complaint, Doc. 1, and Record of Trial, Doc. 10).

(2) The original complaint did not contain the language "or any other registered broker dealer of which Mr. Hammarth may become a principal or controlling person.

Since judgement could only have been entered against Midland in default this expansion of the relief requested in the complaint is in error. See as Ref. CFR

(3) Midland is the alleged perpetrator and Hammarth, the co-defendant accused of aiding and abetting. (See Br. p 11, no.1). Entry of judgement without notice and in irregular fashion against the Corporation leaves us with an aider and abbettor without a perpetrator because:

(a) The corporation is now provided with the defenses of:

(1) Lack of Notice

(2) Res Judicata

(b) The Corporation thus has no obligation to furnish books or papers to Mr. Hammarth to anyone else.

(c) Mr. Hammarth is left enjoined and with no way of obtaining the papers which the Commission seeks.

(d) Mr. Hammarth is put in a position of being unable to avoid contempt charges given the attitude of the District Court.

(e) Since judgement was entered against Midland, the co-defendant and perpetrator, when Midland was not represented, even were adequate notice assumed, which is not the case, a judgement in default might be entered and this would not permit inclusion of the language "or any other registered broker dealer of which Mr. Hammarth may become a principal or controlling person" since it would violate the provisions of Rule 54c of FRCP.

27. Page 15, paragraph 2, and page 16, paragraph 1. ".... It was equally lawful here for the district court broadly to enjoin Mr. Hammarth from all violations similar to those in which he was shown to have participated, especially in view of Mr. Hammarth's purported resignation as the sole officer and director of Midland in the face of a Commission inquiry, and his continued assertion that he had done no wrong".....

Reply (1) Violations of Rule 17a-4 as enumerated in the injunction are specious, because, as was developed supra, none were alleged to have taken place or even mentioned by the Court.

(2) Mr. Hammarth's resignation has gone unchallenged by the Commission either by evidence or cross examination. It was not challenged by the Court, which assumed a prosecutorial role - only as regards the bona fides of the sale, and then was based

upon an assumption violating the defendant's Fifth Amendment rights.

Reply (3) from page 16 - "....especially in view of Mr. Hammarth's resignation as the sole officer and director of Midland in the face of a Commission inquiry...."

(a) The registration of Midland was terminated by SIPC Rule 10 (a) 15 USC jjj(a) on approximately 11 October 1972.

(b) Registration was terminated as of 25 December 1972 under the provisions of 15b -6-1.

(c) There was no Commission inquiry instituted until 13 June 1973.

(4) "...and his continued assertion that he had done no wrong".... The Commission here displays its contempt for the traditional presumption of innocence and avers that anyone so bold as to assert innocence in the face of an accusation by the Commission deserves a more complete and lasting punishment.

28. Reply to Footnote 16, page 16. The efforts on the part of the SEC to enjoin Mr. Hammarth can only be described as an effort at punishment because:

(1) No notice was served on the co-defendant, Midland Equity Corp. and no effort was made to bring it before the Court. (See Record of Trial, Doc. 10).

(2) No adequate investigation of Midland was ever commenced. From the time of Mr. Appoldt's visit, 25 October 1972 until the commencement of proceedings on 12 June 1973 a full 8 months after

the alleged refusal of inspection, no significant contact was had with Midland, indeed Mr. Hammarth's resignation went unknown to the Commission for a full 3½ months.

(3) Since Mr. Hammarth and Midland have long gone their separate ways, the need for injunctive relief has also gone, if indeed it ever existed.

(4) Since injunctions are only applicable at the time of their issuance and not at the time of the filing of the complaint, (See Lattavo Bros. v Huddock, DC Pa 1953, 119 F Supp 587, affirmed 74 S Ct. 478 347 U.S. 910, 98 L Ed 1067), and Mr. Hammarth had resigned from Midland 3½ months before the complaint and a year before the issuance of the preliminary injunction, the validity of the injunction must be questioned.

(5) The fact that the Court is reserving decision for six months left the interests of the public unprotected, casts substantial doubts on the Court's perception of need. (See Mem. Dec. App p 3-7).

(6) The provisions of SIPC had terminated Midland's registration approximately 13 October 1972.

(7) The provisions of Rule 15b 6-1 (17 CFR 240.15b 6-1) had taken effect on 25 December 1972.

(8) Mr. Hammarth's resignation took place on 15 February 1973.

(9) The fact that the Court in ordering the defendant Hammarth to do something which was clearly impossible, (produce the books and records of Midland Equity), to produce books and records of a company

with which he had no present relationship in the face of a lack of evidence that he was employed (See Rec of Trial, Doc. 10), could only be construed as an effort at punishment.

29. Page 17, last sentence paragraph 1. "....He also states (Br. 22) that he has no responsibility to the Commission to locate the books or the present owners of Midland".

Reply: This is a gross distortion. Mr. Hammarth said (Br 22) that he had no responsibility to the Commission to locate Midland or Goggins or the books and records. This was at the time of trial, prior to the issuance of the injunction and it was at that time exactly true. (See Rec. of Trial, Doc. 10).

30. Page 17, paragraph 2. "....While Mr. Hammarth did not convince the district court that the sale of stock to one Joseph Goggins was bona fide, the defense of impossibility may, of course, be raised in defense of any contempt action which may be brought. Maggio v. Zeitz, 333 U.S. 56 (1948); Brotherhood of Loc. Fire & Eng. v Bangor & Aroostook R. Co., 380 F. 2d 570, 581 (C.A. D.C.,1967). The further availability of that defense however has no bearing on the propriety of the preliminary injunction".

Reply: (1) The district court based its case upon "Moreover Hammarth indicated that he was not willing to assist the Commission in locating Goggins and through him, the books and records of Midland. " This statement basing guilt upon a refusal to cooperate in aiding the plaintiff in its investigation is a violation of the defendant's

Fifth Amendment rights against self incrimination, which are available in civil cases.

Reply (2) By permitting judgement in this matter to be entered against the Corporation in absentia as if the Corporation were represented, rather than be judgement in default, the district court has supplied the corporate defendant with defenses under the Sixth Amendment - due process and the doctrine of Res Judicata.

(3) These facts combine to invalidate the injunction as it applies to Midland Equity Corp. and put the papers demanded by the Commission beyond the reach of the defendant, Hammarth.

(4) For all of these reasons, particularly those having to do with the Courts error, the defense of impossibility (Equity will not grant an injunction which would require the defendant to do something impossible. 42 Am JUR 2nd) is quite viable.

31. Page 17, last paragraph. "This is not a case where a guiltless former employee is unfairly being required to aid the Commission in obtaining the books and records of his former employer. Mr. Hammarth refused access to the Commission when he was indisputably in control and rejected or ignored renewals of the Commission's request for access.

Reply: The Commissions attitude here is that anyone who has the audacity to challenge the majesty of the Commission has automatically become a guilty miscreant deserving of lifelong sanctions and permanent damage to his commercial honor.

"...It was not until after this action was brought to compel access by the Commission that Mr. Hammarth claimed he had resigned and had transferred his wife's shares to a third party"....

Reply: There was in fact no communication with the Commission that would have caused Mr. Hammarth to announce the sale of his wife's shares.

(a) Upon the sale of the shares Mr. Hammarth had no further obligation to report to the Commission.

(b) Mr. Hammarth was not contacted by the Commission until institution of proceedings on or about 12 June 1973.

(c) Short of a short, friendly chatty letter to the Commission or the medium of an advertisement placed in the New York Times, there would have been no opportunity for this type of communication until the proceedings hearing 26 June 1973.

For all of the foregoing reasons the court erred and exceeded its discretion in ordering Mr. Hammarth to assist the Commission in obtaining access to the books and records of Midland.

CONCLUSION

For the foregoing reasons the order of the district court should be vacated, and or reversed.

Respectfully submitted,

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